NO. 20948

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONRAD ALLEN,

Appellant,

vs.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 20948

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONRAD ALLEN,

Appellant,

vs.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

Texts

NO. 20948

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONRAD ALLEN,

Appellant,

vs.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION,

Appellee. 1/

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California denying appellant's motion for discharge from custody under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction under Title 28, United States Code, Sections 1291, 1294, and 2255.

1/ This case has also been referred to as "Conrad Allen v. R. W. Meier, et al." (Clerk's Transcript of Record).

II

STATEMENT OF THE CASE

Appellant was charged with failure to register upon entering the United States at San Diego (San Ysidro), California, being a citizen of the United States who had a prior narcotics conviction and being addicted to, and a user of, narcotic drugs. The Indictment was brought under Title 18, United States Code, Section 1407 [Supp. T. R.]. 2/

Appellant entered a plea of guilty on October 15, 1965 [T. R. 13]. He was sentenced to three years in prison with eligibility for parole at any time [T. R. 13].

On January 13, 1966, appellant filed a motion pursuant to Section 2255 of Title 28, United States Code. The motion was based upon the theory that the trial court lacked jurisdiction because the registration requirement of Section 1407 allegedly violated the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States [T. R. 1-8].

The motion was denied without a hearing on January 13, 1966 [T. R. 13-14]. Appellant subsequently filed notice of appeal [T. R. 17].

2/ "T. R." refers to the Transcript of Record.

III

ERROR SPECIFIED

Appellant has specified only one point on appeal:

1. Alleged unconstitutionality of Title 18, United States Code, Section 1407, because it involves a violation of the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States.

IV

STATEMENT OF THE FACTS

On October 15, 1965, appellant entered a plea of guilty to a charge of failure to register upon entering the United States, being a United States citizen who had a prior conviction as defined in Title 18, United States Code, Section 1407, and being a narcotics addict and user [T.R. 13]. After being sentenced, appellant filed a motion for discharge from custody under Title 28, United States Code, Section 2255 [T.R. 1-8]. The motion was denied without a hearing on January 13, 1966 [T.R. 13-14].

V

ARGUMENT

A. TITLE 18, UNITED STATES CODE, SECTION 1407, DOES NOT VIOLATE THE SELF-INCRIMINATION PRIVILEGE OF THE FIFTH AMENDMENT.

Appellant contends that the registration requirement of Title 18, United States Code, Section 1407, violates the privilege against self-incrimination. 3/ However, the courts have held that the statute does not violate the self-incrimination privilege.

Reyes v. United States, 258 F. 2d 774, 778-782 (9th Cir. 1958);

Palma v. United States, 261 F. 2d 93, 95 (5th Cir. 1958);

United States v. Eramdjian, 155 F. Supp. 914, 925-929 (S. D. Cal. 1957).

In requesting this Court to strike down a statute passed by the elected representatives of the people, appellant carries a heavy burden. There is a "strong presumption of constitutionality due to an Act of Congress. . . . " (emphasis added).

United States v. Di Re, 332 U. S. 581, 585 (1948).

3/ Similar contentions have been made in other cases in this Court, which cases are pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Willie Ray Spain v. United States, No. 20888.

Professor Bernard Schwartz wrote in 1957 in regard to the Supreme Court:

> "In the twenty years since 1937, the Court has declared invalid only three federal statutes, and not one of these three laws was a legislative measure of great significance."
>
> "The Supreme Court", Professor Bernard Schwartz, The Ronald Press Company, New York, 1957, p. 26.

Appellant's primary contention is that a person required to register under Title 18, United States Code, Section 1407, would tend to incriminate himself in connection with the California Health and Safety Code. Appellant apparently is referring to California Penal Code Sections 6500 and 6521, since he refers to a commitment to a period not exceeding seven years in cases of narcotics addicts or potential addicts.

However, these statutes do not involve a criminal offense, so there can be no self-incrimination. This is quite clear from the holding in Robinson v. California, 370 U.S. 660 (1962), in which the Supreme Court held that it was a cruel and unusual punishment to subject a narcotics addict to a criminal conviction merely because he was addicted, because this would amount to punishing one for becoming ill. In the same opinion the Supreme Court noted (at pp. 664-665) that a state might properly confine narcotic addicts for treatment and impose penal sanctions for failure to comply with the procedures. If these procedures, which are quite similar in nature to the California provisions, involved

criminal punishment, as appellant contends, then the Supreme Court would have considered them to be unconstitutional as cruel and unusual punishment for being ill. However, the Court's reference to state statutes demonstrates the Court's opinion that these statutes are civil in nature.

The Supreme Court of California has held that there can be no self-incrimination in connection with Penal Code Section 6500, as that section relates to civil commitment, not to criminal prosecution.

In Re De La O, 59 Cal. 2d 128 (1963),
cert. denied, 374 U.S. 856 (1963);
1 San Diego Law Review 68-69.

Thus it is clear that Section 1407 does not involve self-incrimination under the California narcotics commitment statutes. In regard to California criminal statutes, it suffices to say that one registering as an addict or user of narcotics does not admit the commission of any crime. He does not admit an act of any kind. He merely states that he has the status of an addict or user. Furthermore, there is no evidence of venue. Such evidence is essential in a California criminal prosecution.

People v. Megladdery, 40 Cal. App. 2d 748, 762-764 (1940);
People v. Parks, 44 Cal. 105 (1872).

Appellant places great reliance upon the decision in Albertson v. Subversive Act. Cont. Bd., 382 U.S. 70 (1965), involving the statutes requiring Communist Party members to

register if the Party itself fails to do so. The Supreme Court ruled that the registration statute violated the self-incrimination privilege.

However, Albertson involved an exceptional situation. While a Section 1407 registrant admits the commission of no crime within the United States, every registrant under the statutes concerned in Albertson "practically confesses his violation of the Smith Act." 4/

The Communist Party was declared to be an "outlaw" in Title 50, United States Code, Section 841. Since legislation has virtually made the Communist Party "a criminal conspiracy per se" and since the Supreme Court has held that "mere association with the Communist Party" presents sufficient threat of prosecution to support a self-incrimination claim, 5/ an admission of membership, which would be required of all registrants, obviously would violate the privilege.

Albertson should not be regarded as establishing a radical alteration in existing law. In analogous circumstances this Court had declared unconstitutional a statute requiring self-incrimination by every registrant.

Russell v. United States, 306 F. 2d 402 (9th Cir. 1962) (involving firearms registration).

Under Section 1407, there is no aspect of "automatic" self-

4/ 18 University of Chicago Law Review 687, 726 (1951).

5/ Communist Party of United States v. United States, 331 F. 2d 807, 812 (C. A. D. C. 1963), citing Supreme Court decisions.

incrimination by every registrant, even if it be assumed arguendo that some registrants would incriminate themselves. Consequently, it is not reasonable to assume that Albertson has silently overruled Reyes, Palma, and Eramdjian, supra.

A second feature which distinguishes Albertson from the instant case is the fact that the instant case involves a claim that the validity of a Federal statute must depend upon the existence or non-existence of certain state statutes (i.e., self-incrimination exists because the state statutes exist). The most recent Supreme Court decision involving the problem of interference and conflict between Federal and state legislation is Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). In Murphy witnesses contended that their involuntary answers in a state proceeding might tend to incriminate them under Federal law. Rather than eliminate the answers, as appellant urges this Court to do in an analogous proceeding, the Supreme Court ruled (at p. 79) that the answers would be required and that the compelled testimony and its fruits could not be used against the witnesses in subsequent Federal criminal prosecutions. If it be assumed arguendo that Section 1407 is self-incriminatory, the better solution is to protect the registrant in subsequent criminal prosecutions rather than to throw out the baby with the bath water while creating serious problems in connection with Federal interference with state statutes and state interference with Federal statutes. No immunity statute is required in order to protect a person from use of self-incriminating testimony against him.

Adams v. Maryland, 347 U.S. 179, 181 (1954).

A third distinction between Albertson and the Section 1407 issue is the fact that a tribunal was available to rule upon the self-incrimination claim in Albertson. The opinion in that case distinguishes United States v. Sullivan, 274 U.S. 259 (1927), upon this ground, among others (at p. 79). Sullivan, a unanimous decision, held that one claiming that an income tax return called for self-incriminatory answers should raise the objection in the return but could not refuse to make any return at all (at p. 263). By analogy, it would seem self-evident that a potential Section 1407 registrant must raise his objection when registering (which appellant failed to do), unless (1) Sullivan has been overruled (it has not) or (2) the statute falls within the classification of those provisions requiring "automatic" self-incrimination by all registrants, as in Albertson and Russell, supra. It is clear that Section 1407 does not carry the latter stigma.

Appellant also notes that a registrant would be subject to prosecution for making a false statement while registering under Section 1407. However, the Constitution affords no protection against the giving of a false answer in reply to official questions.

Smiley v. United States, 181 F.2d 505, 507
(9th Cir. 1950), cert. denied,
340 U.S. 817 (1950).

B. APPELLANT MAY NOT RAISE A SELF-INCRIMINATION CLAIM IN SECTION 2255 PROCEEDINGS.

Appellant entered a guilty plea in the trial court and subsequently filed a motion under Title 28, United States Code, Section 2255 [T.R. 1-8, 13].

This Court has held that a plea of guilty "waives all defenses other than that the indictment charged no offense under the laws of the United States. . . . "

Forthoffer v. Swope, 103 F.2d 707, 708 (9th Cir. 1939).

It has been held that a voluntary and knowing plea of guilty constitutes a waiver of all nonjurisdictional defenses.

Thomas v. United States, 290 F.2d 696, 697 (9th Cir. 1961).

This rule has been applied where self-incrimination was claimed after a guilty plea was entered.

Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964).

However, appellant asserts that the trial Court lacked jurisdiction, apparently upon the theory that Section 1407 is unconstitutionally self-incriminatory. A glance at the statute is sufficient to refute this contention. Section 1407 requires registration by any international traveler who is a citizen of the United States and falls within one of the following classifications:

1. One who is addicted to narcotic drugs.

2. One who uses narcotic drugs.

3. One who has been previously convicted of certain violations.

Appellant was charged under all three classifications. The latter provision cannot be self-incriminatory. Once a person has been convicted of a crime, he cannot claim the Fifth Amendment privilege in regard to questions concerning that crime.

United States v. Romero, 249 F. 2d 371, 375 (2nd Cir. 1957).

Assuming, without conceding, that the addict and user provisions of Section 1407 are unconstitutionally self-incriminatory, the reference to registration by a prior convicted violator, contained in the same statute and in the indictment, would not be affected by the superfluous references to addicts and users.

A court may disregard surplusage in an indictment.

Ford v. United States, 273 U.S. 593, 602 (1927);

Soper v. United States, 220 F. 2d 158, 161 (9th Cir. 1955).

Consequently, it cannot be said that the trial court lacked jurisdiction, in view of the allegation of failure to register as a prior convicted violator, so the rule set forth in Forthoffer, Thomas, and Harris, supra, should be sufficient to prevent appellant from raising a Section 2255 issue of this nature after entering a guilty plea.

Furthermore, a judgment of a Court of the United States is entitled to a presumption of regularity.

Forthoffer, supra, at 711.

Thus, if it be assumed arguendo that the addict and user provisions of Section 1407 are unconstitutional, it may be presumed that the guilty plea was entered under the unquestioned prior convicted violator provision. In fact, this was the understanding of the trial court [T.R. 13-14].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO